SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 11, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5051 Genesis Merchant Partners, L.P., et al.,
Plaintiffs-Respondents,

-against-

Gilbride, Tusa, Last & Spellane, LLC, et al.,
Defendants-Appellants.

Index 653145/14

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Law Office of Wallace Neel, P.C., New York (Wallace Neel of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 2, 2017, which granted plaintiffs' motion for summary judgment on the issue of liability for legal malpractice and for summary judgment dismissing the counterclaims, unanimously reversed, on the law, without costs, and the motion denied.

At issue on this appeal is whether plaintiffs Genesis Merchant Partners, L.P. and Genesis Merchant Partners II, L.P. (collectively, Genesis) are entitled to summary judgment on

liability in this legal malpractice action premised the failure of defendant Gilbride, Tusa, Last & Spellane, LLC, and defendant attorneys in that firm, Jonathan M. Wells, Kenneth M. Gammill, Jr., and Charles S. Tusa (collectively, Gilbride) to perfect security interests in life insurance policies. Because issues of fact exist, Supreme Court erred in granting Genesis summary judgment.

The plaintiffs are related venture capital firms. Between 2008 and 2011, Genesis agreed to make four secured loans totaling $4.425 million to nonparty Progressive Capital Solutions LLC (Progressive) to finance Progressive's purchase of several portfolios of life insurance policies. The loans were to be secured, in part, by the insurance policies themselves. Portions of the loan proceeds were to be used to buy life insurance policies to collateralize the loans.

In May 2008, Genesis retained Gilbride to represent it in connection with the first of the loans, which Progressive repaid. Gilbride also represented Genesis in connection with three additional loans, issued on December 22, 2008, July 31, 2009, and February 3, 2011 (respectively, the second, third and fourth loans).

It is undisputed that Gilbride drafted the loan documents, including the Collateral Assignment of Contracts and the UCC-1

financing statements for each loan. Gilbride filed a UCC-1 financing statement on May 27, 2008, for the first loan, listing Progressive as the Debtor and Genesis as the Secured Party and broadly declaring a security interest in all of Progressive's assets. The UCC-1 financing statements for the second, third and fourth loans, also filed by Gilbride, contained similar declarations. However, the UCC-1 financing statement for the fourth loan also listed, for the first time, the policy numbers of each insurer for seventeen life insurance policies pledged as additional collateral.

Progressive defaulted on the latter three loans. Genesis brought a lawsuit against Progressive in Connecticut. The parties entered into a settlement that imposed additional performance and payment obligations upon Progressive. Progressive defaulted on the settlement. Thereafter, Genesis contacted the underwriting insurers to collect on the life insurance policies. The underwriters refused to give Genesis any information or proceeds in connection with the insurance policies because they had no record of the collateral assignments to Genesis.

Genesis commenced this action, alleging that Gilbride committed legal malpractice by failing to perfect Genesis's security interests in the life insurance policies that served as

collateral on the second, third and fourth loans, resulting in the loss of millions of dollars on life insurance policies valued at more than $84 million. Gilbride denied committing legal malpractice and counterclaimed for $112,000 in unpaid attorneys' fees on the theories of quantum meruit and account stated.

The crux of the factual dispute is whether Gilbride had a duty to perfect Genesis's security interests in the collateral. Genesis alleges that Gilbride was retained to advise it on the loans, including drafting the loan documents and ensuring that Genesis's security interests in the collateral were secured and perfected under applicable law. Gilbride maintains that it was retained only to draft the loan documents and that this limited representation was at the express instruction of Genesis.

Article 9 of the UCC regulates security interests to personal property, permitting creditors to protect their interest in collateral held by debtors or third parties (*Badillo v Tower Ins. Co. of N.Y.*, 92 NY2d 790, 794 [1999]). However, article 9 "does not apply to. . .a transfer of an interest in or assignment of a claim under a policy of insurance" (UCC 9-109[d][8]).

A security interest in the proceeds of an insurance policy may be created by possession of the policy *(Matter of Bickford's Estate*, 265 App Div. 266, 268 [3d Dept 1942]; *Cornell v Cornell*, 54 NYS2d 434, 435-436 [Sup Ct, NY County 1945], *affd* 269 App Div.

931 [1st Dept 1945]). Alternatively, a creditor may obtain collateral assignment of the policies. This process entails obtaining signed documents that assign the benefits to the creditor — in this case, Genesis — and then filing them with the carriers for the insurance policies. Here, it is undisputed that the security interests in the life insurance policies were not perfected.

Supreme Court granted Genesis summary judgment, rejecting Gilbride's contention that perfecting the security interests was outside the scope of its representation. The court held — on a theory not raised by the parties in the briefing below — that even if Gilbride ultimately established that the scope of representation was limited at Genesis's instructions, Gilbride "voluntarily assumed the obligation to perfect the security interests," by filing the UCC-1 financing statements and billing Genesis for that work, and that Gilbride negligently discharged that duty. The court dismissed the counterclaims for unpaid attorneys' fees, as Gilbride sought payment for the same work that constituted malpractice.

Standard of Review

We start with the familiar legal principle that summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the

absence of any material issues of fact" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Moreover, the evidence will be construed in the light most favorable to the nonmoving party (*id.*). Summary judgment must be denied "where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]) or where "the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks omitted]).

The Scope of Gilbride's Representation

On this record, the parties' competing affidavits, the Collateral Assignment of Contracts, and the emails raise issues of fact as to whether Gilbride's role was limited to drafting the loan documents and preparing the closing binders at the specific instructions of Genesis.

There is no engagement letter that defines the scope of Gilbride's representation. Steven Sands, Senior Portfolio

Manager of Genesis, states in an affidavit that "[Genesis] initially retained [Gilbride] to draft loan documents for a loan to [Progressive] that required collateral assignments of life insurance policies and other assets as collateral for the loan. This engagement included perfecting the collateral."

Jonathan Wells, an attorney at Gilbride who represented Genesis, disputes that the law firm had a duty to perfect the security interests. He states that "Genesis specifically restricted Gilbride from undertaking" the tasks of the actual filing of the collateral assignment forms.

In order for Gilbride to limit the scope of its representation, it had a duty to ensure that Genesis understood the limits of its representation (*see Unger v Horowitz*, 8 AD3d 62, 63 [1st Dept 2004]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.2[c] ["A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel"]). An attorney may not be held liable for failing to act outside the scope of the retainer (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]).

Here, the Collateral Assignment of Contracts raises a question as to the scope of the representation. Section 11(c) of

the contract provides, in relevant part, that

> "[a]dditionally, [Progressive] shall deliver to [Genesis] evidence of perfection of [Genesis's] security interest in, and evidence of the acceptance of filing of Assignments of Policy as Collateral Security Agreements, or their equivalent, in favor of [Genesis], from the respective insurance carriers with regard to the Contracts within twenty one (21) business days of the date hereof."

The provision unambiguously requires Progressive to deliver to Genesis documents evidencing perfection of Genesis's security interest in, and the acceptance of, the collateral assignment agreements from the insurance carriers.

Gilbride asserts that the final provision was added at Genesis's insistence and that it included the mechanism and direction for perfecting the security interests. Wells maintains that the structuring and negotiation of the loans were between Genesis and Progressive as evidenced by the draft term sheets.

In addition, the provision suggests that Progressive and Genesis, not Gilbride, were tasked with the responsibility of taking the mechanical steps necessary to perfect the security interest. Furthermore, the provision arguably supports Gilbride's position that despite the filing of the UCC-1 financing statements, the parties understood that the security interests in the insurance policies could only be perfected by

Genesis obtaining a collateral assignment of the policies.

The emails in the record similarly raise questions as to the scope of Gilbride's representation. Wells states that while representing Genesis, he communicated with Timothy W. Doede (now deceased), former Portfolio Manager of Genesis, and Chris Kelly, the former Chief Compliance Officer, Chief Operating Officer and General Counsel of the investment manager to Genesis. Wells maintains that he was instructed by Doede that Genesis would handle everything related to the insurance policies. Wells also cites to an email where he inquired of Chris Kelly whether "[Kelly was] coordinating executing and delivering" what Progressive needs regarding the assignments. Kelly's response was "Done," arguably implying that Genesis was responsible for the assignments.

Genesis maintains that the emails show otherwise. It references emails that suggest that Gilbride was seeking to record the collateral assignments. For example, on January 31, 2011, prior to the closing of Loan 4, Wells asked John Puglisi at Progressive, "[W]hat is the best case timing to file the Assignments with carriers? Is there a way to expedite that like electronic filing?" Wells asked shortly afterward, "Would carrier provide fax confirm they are processing the assignment request?" Puglisi replied, "I am going down the carrier list now

to come back with a detailed explanation regarding the [assignments] — [carrier process can differ]" (first brackets added). In addition, on February 3, 2011, when Genesis told Wells, a partner at Gilbride, that it was ready to wire $2.5 million, Loan 4, to Progressive, Wells replied, "Let me know when the wire goes out, [sic] I will immediately file the UCC." In short, both parties can point to emails that support their positions as to the scope of representation.

Accordingly, there are issues of fact as to the scope of Gilbride's representation, and if limited, whether Gilbride ensured that Genesis understood that Gilbride was not responsible for perfecting the security interests in the life insurance policies.

Voluntary Assumption of a Duty to Perfect

Turning next to whether Gilbride voluntarily assumed the duty to perfect the security interests, we note that the parties have not brought to our attention legal malpractice claims where an attorney voluntarily assumes a duty to act. The cases relied on by Supreme Court are distinguishable as they do not relate to a claim for legal malpractice arising from a dispute over the scope of the retainer (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 594 [2005] [assumption of duty by underwriter or issuer of securities]; *Applewhite v Accuhealth*,

Inc., 21 NY3d 420, 430-431, 434 [2013] [assumption of special duty by a municipality in a negligence claim]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994] [maintenance contractor for hospital assumed duty to noncontracting nurse for injuries she sustained when fan dismounted from wall]; *Podesta v Assumable Homes Dev. II Corp.*, 137 AD3d 767 [2d Dept 2016] [assumption of duty by vendors of real property to record partial satisfaction of mortgage]; *Nilazra, Inc. v Karakus, Inc.*, 136 AD3d 994 [2d Dept 2016] [third-party action for contribution and indemnification by attorney defendant against another attorney, who voluntarily assumed a duty to file a notification with the state in connection with the purchase of a business]).

Even assuming that the duty principles in the aforementioned cases can be applied to a legal malpractice claim, Gilbride's filing of the UCC-1 financing statements and billing Genesis for that work does not establish that summary judgment is warranted on this record.

Gilbride acknowledges that it filed the UCC-1 financing statements for each of the loans. Wells asserts that the purpose of the UCC-1 financing statements was to perfect Genesis's security interests in Progressive's collateral other than the insurance policies. Wells maintains that the UCC-1 financing statements achieved this goal. Wells states that "the sole

purpose" for listing the life insurance policies in the UCC-1 financing statement for the fourth loan was for "alerting the world that these policies have been borrowed against." It "was not meant as a security device for the life insurance policies, as the securitization of the life insurance policies was effectuated by the Collateral Assignment of Contracts and the filing of collateral assignments (or carrier specific equivalents) with the respective insurance carriers" (emphasis omitted).

Wells's justification that he was simply putting the world on notice that the policies were borrowed against appears self-serving when viewed in a vacuum. However, Wells's factual averments are arguably consistent with Gilbride's interpretation of the Collateral Assignment of Contracts, emails and billing entries. Wells's explanation raises an issue of credibility that is not appropriately resolved on a motion for summary judgment (*see Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218 [1st Dept 2002]).

Nor is Gilbride's billing for the filing of the UCC-1 financing statements sufficient to support a conclusion that the law firm voluntarily assumed a duty. Supreme Court characterized the billings as for "policy collaterizations." However, this phrase is not used in the actual bills. Gilbride billed for the

following: "[r]eview assignment of life policy and mortgage matters" (Sept. 15, 2009 bill entry); "[r]eview final assignments of collaterally assigned insurance policies; review final closing books" (bill entry for Feb. 8, 2011); "[r]eview assignments filed with carrier; compare to policies" (bill entry for Feb. 9, 2011). Gilbride also billed for reviewing and filing the UCC financing statements.

The billing entries note only that Gilbride reviewed the assignments. They do not state that Gilbride was going to file the assignments or perfect the security interests in the life insurance policies. The billing entries arguably relate to finalizing the loans and the items to be included in the closing binder. Moreover, amending the loan documents — and billing for the amendments — does not conclusively demonstrate that Gilbride assumed a duty to perfect the security interests in the loans.

In the light most favorable to Gilbride as the nonmoving party, the billing entries may be viewed as supporting the law firm's contention that it was retained only to prepare the loan documents, including the Collateral Assignment of Contracts and the closing binder.

Discovery and Gilbride's Counterclaims

Finally, we note that discovery in this case has not been completed. Gilbride has outstanding discovery requests,

including discovery relating to issues of proximate cause. Under section 11(c) of the Collateral Assignments of Contracts, Progressive had 21 days to furnish proof of the assignments after the loan proceeds were released by Genesis to Progressive. Gilbride seeks discovery relating to what Progressive did with the loan proceeds during this 21-day period, as well as whether other creditors obtained priority within those 21 days. Supreme Court granted Genesis summary judgment during discovery proceedings, foreclosing Gilbride's attempt to obtain material and necessary discovery to its defenses.

Since we are reversing and denying summary judgment on liability for legal malpractice, we hold that the counterclaims for quantum meruit and account stated were improperly dismissed as well.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

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Gische, J.P., Kapnick, Oing, Moulton, JJ.

5113-
5114 Berkeley Research Group, LLC, Index 652218/16
Plaintiff-Appellant,

-against-

FTI Consulting, Inc.,
Defendant-Respondent.

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Alston & Bird LLP, New York (John F. Cambria of counsel), for appellant.

Cole Schotz P.C., New York (Joseph Barbiere of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 28, 2016, which granted defendant's motion to dismiss the first amended complaint, unanimously modified, on the law, to deny the portion of the motion seeking to dismiss the causes of action for breach of contract and a declaratory judgment, and otherwise affirmed, without costs. Order, same court and Justice, entered April 17, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to replead, unanimously reversed, on the law, without costs, and the motion granted.

The underlying dispute in this appeal is whether, under the express terms of the operative agreements, defendant had an unfettered, unilateral right to terminate one of them, the

subcontractor agreement. After defendant unilaterally terminated the subcontractor agreement, plaintiff commenced this action alleging breach of contract and breach of the covenant of good faith and fair dealing, also seeking a declaratory judgment. Supreme Court granted defendant's motion to dismiss the complaint and denied plaintiff's subsequent motion for leave to replead.

Plaintiff (BRG) and defendant (FTI) are competing consulting firms. Nonparty Allen D. Applbaum was employed as head of FTI's global risk and investigations practice until January 2015, when he resigned. Shortly thereafter, in March 2015, he began employment with BRG. To resolve disputes regarding a non-compete provision in Applbaum's employment contract with FTI, on March 27, 2015, FTI, BRG and Applbaum entered into a Settlement Agreement that provided that they would, among other things, share the revenue generated by BRG's and/or Applbaum's work on FTI matters. On the same date, FTI and BRG separately entered into a subcontractor agreement that allowed Applbaum, now a BRG employee, to continue to perform certain professional services for FTI in connection with FTI matters. The subcontractor agreement, which was annexed as Schedule 3 to the settlement agreement, identifies FTI as the "Company" seeking to retain Applbaum and BRG as the "Consultant" that employs Applbaum and "agrees to permit [him] to perform such services."

The settlement agreement requires that BRG share with FTI all fee revenue that Applbaum originates during the first 12 months of his employment at BRG at the rate of 12.5% for work that Applbaum himself performs and 10% for work performed by other BRG employees (FTI revenue share). Conversely, FTI agreed to share with BRG, at a rate of 10%, all professional staff and expert fee revenue generated from matters referred to FTI by Applbaum during that same twelve (12) month period (BRG revenue share). BRG guaranteed that it would pay FTI "a minimum of $500,000 in respect of the FTI Revenue Share," in two equal installments. These payments were "Advance Payments" that would be deducted from what was owed as the FTI revenue share. The first advance payment, due upon execution of the settlement agreement, was paid. In December 2015, FTI notified BRG that it had terminated the subcontractor agreement. The second advance payment, due on the first anniversary of the settlement agreement, which occurred only after FTI terminated the subcontractor agreement, was not paid by BRG.[1]

The settlement agreement references the subcontractor agreement and the subcontractor agreement incorporates certain provisions of the settlement agreement. Section 4(b) of the

[1]The nonpayment of the second advance payment is the subject of the third cause of action for a declaratory judgment.

settlement agreement provides:

> "The Parties agree that a material consideration for Applbaum and BRG of this Agreement is the execution of and compliance with the Subcontractor Agreement attached as Schedule 3 to this Agreement, and further agree that this Agreement shall not become effective until the Subcontractor Agreement has been executed by all parties provided that the Revocation Period, as such term is defined below, has expired. The Parties agree to work together to serve the best interests of these two clients and hereby confirm to each other to cooperate in good faith to do so. FTI does not have any present intention of replacing Applbaum as the team leader on these engagements and it is currently contemplated he will remain the team leader for the duration of these engagements; provided, however, the Parties agree that: (i) Applbaum shall report to the Engagement leader . . . and (ii) FTI . . . retains exclusive control and discretion to manage these matters"

As pertinent to this dispute, section 10 of the settlement agreement defines the revocation period as follows:

> "In the event that Applbaum elects to execute this Agreement, he has a period of seven (7) days following the date of his execution to revoke this Agreement (the "Revocation Period"), which revocation must be in writing. . . . This Agreement will not be effective or enforceable until the expiration of the Revocation Period (the "Effective Date").

The subcontractor agreement contains no express revocation period. Section 1(B) of the subcontractor agreement states that "[s]ubject to Section 4 of the settlement agreement, which is

incorporated herein, either Party [FTI or BRG] may immediately terminate the Agreement or any State of Work by delivering written notice to the other Party." In addition, the subcontractor agreement is subordinate to the settlement agreement, in that section 9.B provides, "The parties agree that, to the extent any term or condition set forth herein in contrary to, or inconsistent with, the terms of the Settlement Agreement, the terms of the Settlement Agreement shall control."

It is the interplay of these provisions, in particular the termination language in the subcontractor agreement, that frames BRG's and FTI's dispute over whether FTI had the unilateral and unfettered right to terminate the subcontractor agreement. Relying only on the subcontractor agreement, FTI contends, and the motion court agreed, that section 1(B) gave either party an unfettered right to terminate the subcontractor agreement at any time and without reason. BRG, however, contends that the subcontractor agreement's express incorporation of section 4 of the settlement agreement is important, requiring reference to that section in interpreting the termination provision of the subcontractor agreement. Section 4 of the settlement agreement, in part, refers to a revocation period as well as the parties' intention to work together to serve the best interests of certain of the parties' clients. BRG argues that the incorporation of

section 4 into the subcontractor agreement explicitly limits the scope of the subcontractor agreement and that the right to "immediately" terminate the Subcontractor Agreement is not the same as having the right to terminate at any time.

It is axiomatic that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Spivak v Bertrand*, 147 AD3d 650, 651 [1st Dept 2017]). If, however, a contract's provisions are subject to more than one or conflicting reasonable interpretations, the agreement will be considered ambiguous, requiring a trial on the parties' intent (*JPMorgan Chase Bank, N.A. v Luxor Capital Realty, LLC*, 101 AD3d 575, 576 [1st Dept 2012]; *RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 [1st Dept 2009]). The language of the instant operative agreements allows for more than one reasonable interpretation of the parties' intentions when they entered into the agreements. Accepting the facts as alleged in the complaint as true, we find that BRG has a cause of action for breach of contract (*see e.g. Cron v Hargo Fabrics*, 91 NY2d 362, 366 [1998]). These interrelated agreements are ambiguous because the subcontractor agreement is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New*

York City Off-Track Betting Corp. v Safe Factory Outlet, Inc., 28 AD3d 175, 177 [1st Dept 2006] [internal quotation marks omitted]).

While FTI's reliance on the term "immediately" in the subcontractor agreement may be reasonable, it does not readily account for why that provision, which contains the additional "[s]ubject to" language, referring to the settlement agreement, would allow FTI the unfettered right to immediately terminate the subcontract agreement. Likewise, while BRG's interpretation may also be reasonable, it does not fully account for how a present intention not to terminate Applbaum from employment is equivalent to an ongoing duty to use his services for the entire term of the settlement agreement. Given these ambiguities, the breach of contract cause of action should not be dismissed on the pleadings.

The breach of implied covenant of good faith and fair dealing claim however, was correctly dismissed, because it duplicates the breach of contract action, both claims arising from the same facts (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

Because the viability of the declaratory judgment claim, in part, depends on the viability of the contractual claims, the

declaratory judgment claim, for a declaration that BRG is excused from performing under the settlement agreement, should proceed at this time, given our holding that the agreements are subject to more than one interpretation.[2]

CPLR 3025(b) provides that leave to amend shall be freely given. BRG should be given leave to replead to include allegations regarding the drafting history of the agreement. Such allegations may be necessary to ascertain the parties' intent and the purpose of the subcontract agreement as a whole.

We also grant BRG leave to amend its complaint to add allegations that FTI failed to make payments due under section 4(a) of the settlement agreement for work performed by Applbaum. BRG's failure to supply a redlined proposed amended complaint is a "technical defect, which the court should have overlooked," since these allegations were properly highlighted in BRG's counsel's affirmation and moving brief (*see Medina v City of New York*, 134 AD3d 433, 433 [1st Dept 2015]; *see also* CPLR 3025[b]). FTI does not contend that the proposed claim is palpably insufficient, and, because the statute of limitations had not yet run on this breach of contract claim, BRG could have brought it

[2]We do not reach the issue of whether the payments due are contingent on performance or other aspects of the settlement agreement.

as a separate action, without any need for a showing of merit (*see* CPLR 213[2]). Under all these circumstances, the absence of an affidavit of merit or other evidentiary proof is not dispositive (*see Delta Dallas Alpha Corp. v South St. Seaport L.P.*, 127 AD3d 419 [1st Dept 2015]).

We have considered plaintiff's remaining arguments, including the argument that the case should be remanded to a different justice, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

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Renwick, J.P., Gische, Tom, Oing, Singh, JJ.

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176 PM, LLC,
Plaintiff-Appellant,

-against-

Heights Storage Garage, Inc.,
Defendant-Respondent.

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Heights Storage Garage, Inc.,
Plaintiff-Respondent,

-against-

Stephen B. Reynolds,
Defendant-Appellant.

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Akerman LLP, New York (Michael S. Simon of counsel), for appellants.

Law Office of Mark S. Friedlander, New York (Mark S. Friedlander of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 30, 2015, in favor of the landlord Heights Storage Garage, Inc. and against the tenant 176 PM, LLC in the total amount of $824,508.19, and bringing up for review an order, same court and Justice, entered August 25, 2014, which granted the landlord summary judgment dismissing the complaint and granted the landlord's motion for summary judgment on its 2nd, 5th, 6th and 7th counterclaims, and an order, same court and

Justice, entered on or about April 6, 2015, which determined that the amount of rent due to the landlord was $818,313.46; and judgment, same court and Justice, entered July 18, 2016, in favor of the landlord in the total amount of $1,199,162.94, and bringing up for review an order, same court and Justice, entered on or about April 6, 2016, which, among other things, granted the landlord summary judgment on its causes of action against defendant Stephen B. Reynolds for the rent due from the tenant, unanimously reversed, on the law, without costs, the judgments vacated, and the landlord's summary judgment motions denied with regard to the landlord's fifth and sixth counterclaims and fifth and sixth causes of actions. Appeals from order, entered on or about April 6, 2015 and from order of same court and Justice, entered February 17, 2016, unanimously dismissed, without costs, as superseded by the appeals from the April 30, 2015 and July 18, 2016 judgments.

This dispute stems from a breach of a commercial lease by a tenant and a guarantor. In August 1996, the predecessor in interest of the tenant entered into a 28-year lease (until August 2024) with the landlord to rent the landlord's building, a four-story parking garage with two retail subtenants at the street level, located in Manhattan. In June 2011, the landlord served the tenant with a written notice to cure 21 lease violations

primarily related to the physical deterioration of the building caused by the tenant. In response, the tenant commenced the instant action and moved by order to show cause for a *Yellowstone* injunction seeking to prevent the landlord from taking any steps to terminate the tenancy.

However, a month before the scheduled Yellowstone injunction hearing was to take place, the tenant advised the landlord that it was vacating the premises, which it did on August 31, 2013. In September 2013, the landlord answered the complaint, asserting counterclaims for damages for the tenant's alleged failure to maintain the property as required under the lease leading to code violations (second counterclaim), rent for the 10-year remainder of the lease term (fifth and sixth counterclaims), and payment of $43,493.25 per month for the 12-month period from September 1, 2012, through August 31, 2013 (seventh counterclaim).

In March 2014, the landlord moved for summary judgment on the second, fifth, sixth, and seventh counterclaims. In opposition, the tenant argued that there had been an acceptance of surrender of the lease by operation of law, since the landlord had assumed dominion and control of the building for its own benefit after the tenant gave written notice that it was vacating the premises in August 2013. The tenant claimed that it returned the keys to the landlord when it vacated the property, and that

the landlord retained Central Parking Systems as the full-time garage operator. Moreover, the landlord collected the parking income and sent bills directly to the subtenants. Finally, the tenant asserted that the landlord had placed the property for sale at some unidentified juncture.

In August 2014, Supreme Court granted the landlord summary judgment on liability on its counterclaims (2nd, 5th, 6th and 7th) and found that an assessment of the landlord's damages and the tenant's set offs on those claims was warranted.[1] With regard to the second counterclaim, for costs incurred as a result of actions or inactions of the tenant leading to the issuance of code violations, the court found that the tenant offered no reasonable defense to those violations. With regard to the fifth and sixth counterclaims, for unpaid rent, the court found that there was no acceptance of surrender of the lease by operation of law because it was undisputed that the landlord continued to demand rent from the tenant for a year. Finally, with regard to the seventh counterclaim (payments owed for September 1, 2012 through August 31, 2013), the court found that it was not disputed.

[1] Supreme Court dismissed the tenant's complaint because there was no need for a *Yellowstone* injunction since the tenant had surrendered possession.

After it granted summary judgment on liability on the above counterclaims, Supreme Court directed the landlord to quantify the amount of the base rent, late fees, and interest that remained due under the lease occasioned by the tenant's premature departure from the premises. In January 2015, the landlord moved for summary judgment, quantifying the amount due as $635,348.93. The landlord attached a spreadsheet indicating that base rent owed from August 1, 2013 through December 31, 2014, with late charges and interest, was $1,503,903.93, and that the offset for rents the landlord had received from the current tenants at the premises was $865,555.30, reducing the amount owed by the tenant to $635,348.63.

The landlord noted that base rent alone, without the late charges and interest, totaled $1,004,444.30. However, paragraph 11 of the lease contemplated a late charge of $2,000 for the fixed minimum payment of rent after the fifth day of the month in which the payment is due, together with a charge of 4% for any additional rent unpaid after the same date and a charge of 4% of the amount of any rent or additional rent that remains unpaid from a prior month. Without those late fees, the total amount owed, taking into account rent received by the landlord, would have been $190,102.65.

The tenant disputed the landlord's computation of damages

and the manner in which it applied late fees to the amounts allegedly owed. The tenant argued that the landlord's spreadsheet contained incorrect arithmetic, and that the difference between base rent due (without including late fees) and the rent received from the commercial tenants was $94,449.80, not $190,102.65. Moreover, the tenant argued, when calculating late fees, the landlord disregarded a common bookkeeping principle of applying the amount received each month to the oldest outstanding balance, and that if it had done so, the landlord would have eliminated the older late fee payments, thereby preventing the accumulation of massive late fees. Instead, the landlord allowed the late fees to aggregate in its favor and to the tenant's detriment.

Furthermore, the tenant argued, the late charges should have applied not to the entire base rent, but rather only to the difference between the amount owed by the tenant each month and the amount of rent received by the landlord from the commercial subtenants for that corresponding month. The tenant argued that the landlord's computation of $635,348.93 was grossly disproportionate to the amount of actual rent owed, $94,449.80.

Ultimately, Supreme Court granted the landlord summary judgment, awarding damages for unpaid rent and additional rent through March 31, 2015 in the amount of $818,313.46. The court

found that the only remaining disputes concerned the calculation of late fees imposed by the landlord, and where the credits for rent collected from the new subtenants should appear on the landlord's ledgers.

The court also found defendant Reynolds, the guarantor, personally liable for the tenant's liabilities under the lease, pursuant to a "good guy guaranty," which Reynold had signed on March 30, 2007. Reynolds asserted the defense that the landlord had accepted the tenant's August 31, 2013 surrender of the premises and that the landlord had released the premises to Central Parking System of New York, Inc. and two other subtenants, and therefore he was released from any liability under the good guy guaranty. Reynolds also cross-moved for leave to amend his answer to assert the defense that his obligations under the good guy guaranty were discharged by virtue of the September 10, 2007 lease modification to correct a "mistake" made in a prior lease modification that had limited the tenant's liability for the payment of real estate taxes to tax increases, as opposed to 100% of all real estate taxes.

Thus, both the tenant and the guarantor challenge the grant of summary judgment to the landlord on liability and damages with regard to the alleged breach of the lease obligations that accrued after the tenant's premature abandonment of the premises.

The parties do not challenge the grant of summary judgment on liability and damages for the alleged breach of the commercial lease obligations that accrued prior to the tenant's premature abandonment of the premises.

We find that the tenant raised a triable issue of fact as to whether a surrender of the premises was effected by operation of law (*see Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691–692 [1986]). More specifically, the tenant raised a viable issue of fact as to whether the landlord took dominion and control of the building for its own benefit. The tenant submitted evidence that, after it returned the keys to the landlord and vacated the premises, the landlord took possession of the premises, and not only sent bills directly to the subtenants, but also entered into its own contract with Central Parking to operate the parking garage and to pay the landlord each month all the income received from the garage operations. The tenant submitted further evidence that the landlord placed the property for sale at some juncture. When viewed in the light most favorable to the tenant, as nonmoving party, and given the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), these facts support an inference that, upon the tenant's abandonment, the landlord intended to take dominion and

control of the premises for its own benefit.

Thus, Supreme Court improperly overlooked triable issues of fact on liability presented by the tenant and by the guarantor's defense of acceptance of surrender of the lease by operation of law. However, the motion court properly denied the guarantor's cross motion as devoid of merits, to the extent it found him liable under his personal good guy guaranty for the tenant's obligations under the lease. Finally, the tenant and guarantor raised triable issues on damages as to the alleged breach of the lease obligations that accrued after the tenant's premature abandonment of the premises. Specifically, if there is a finding of liability, a trial is warranted to determine the quantum of damages due under the lease and guaranty because the tenant and the guarantor have highlighted the aforementioned discrepancies in the amounts allegedly owed under the remainder of the lease, mainly disputing the landlord's methodology of its calculation of outstanding fees and other charges *(see e.g. Eugenia VI Venture Holdings, Ltd. v AMC Invs., LLC*, 35 AD3d 157, 159 [1st Dept 2006]). Further, in our view, the judgments against the tenant and the guarantor, in the amounts of $824,508.19 and $1,199,162.94, respectively, appear to be unreasonable and grossly disproportionate to the amount of actual unpaid rent, which the evidence submitted by the tenant suggests is only

$94,449.80 (*see generally Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]; *see also Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5426 The People of the State of New York, Respondent, Ind. 899/15

-against-

Ahmadou Sankara, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered December 9, 2015, as amended February 16, 2016, convicting defendant, after a jury trial, of three counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress forged debit and gift cards recovered from his wallet subsequent to his arrest. The record does not support any of defendant's multiple arguments for suppression.

Given that defendant's car was stopped with its lights off in a no parking zone, the police had an objective, credible reason to approach for information (*see People v Ruiz*, 100 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]). Defendant

argues that the objective, credible reason dissipated at a point in the encounter when the testifying officer no longer believed that the car was illegally parked. However, the officer's testimony demonstrates that defendant engaged in suspicious conduct before the officer abandoned his belief about the illegal parking.

Upon the officers' approach to his car, defendant's "furtive motion[] in attempting to stuff something under the passenger seat . . . caused the officer to reasonably fear for his safety and reasonably believe that defendant might possess a weapon" (*People v Feldman*, 114 AD3d 603, 603-04 [1st Dept 2014], *lv denied* 23 NY3d 962 [2014]; *see also People v Alejandro*, 142 AD3d 876 [1st Dept 2016], *lv denied* 28 NY3d 1070 [2016]). The officers were thus justified in directing defendant to show his hands and get out of the car, and in performing a limited search of the area where defendant appeared to have hidden something (*see Feldman*, 114 AD3d at 603-04; *People v Anderson*, 17 AD3d 166, 168 [1st Dept 2005]). The search revealed contraband, providing probable cause for defendant's arrest.

Defendant failed to preserve his next suppression argument, which is that the police unlawfully searched his wallet at the precinct after his arrest (*see People v Miranda*, 27 NY3d 931 [2016]), and we decline to review it in the interest of justice.

Because of defendant's failure to raise this issue at the suppression hearing, "the People were never placed on notice of any need to develop the record as to th[is] issue[], or to otherwise establish the validity of the search" (*People v Hawkins*, 130 AD3d 426, 427 [1st Dept 2015], *lv denied* 26 NY3d 1088 [2015]; *see People v Tutt*, 38 NY2d 1011, 1012-13 [1976]). In particular, defendant never claimed that the People needed to introduce more evidence at the hearing concerning police inventory procedures. Accordingly, the record was insufficiently developed to permit appellate review of this issue (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]).

Defendant's final suppression argument is that when the police used a bank card reader to determine whether the account information contained in the magnetic strips of the cards recovered from defendant's wallet matched the information printed on the front of the cards, this action was similar to a cell phone search, and it thus required a search warrant under *Riley v California* (573 US __, 134 S Ct 2473 [2014]). However, a growing number of cases addressing this technology recognize that this type of police action does not violate any privacy interest protected by the Fourth Amendment (*see e.g. People v Dent*, 57 Misc 3d 300, 308-10 [Sup Ct Queens County 2017]; *United States v Hillaire*, 857 F3d 128, 129-30 [1st Cir 2017]; *United States v*

Turner, 839 F3d 429, 434- 437 [5th Cir 2016]; *United States v DE L'Isle*, 825 F3d 426, 431-433 [8th Cir 2016]; *United States v Bah*, 794 F3d 617, 630-633 [6th Cir 2015], *cert denied sub nom. Harvey v United States*, __ US __, 136 S Ct 561 [2015]).

The verdict was not against the weight of the evidence, as viewed in light of the court's charge (*see People v Noble*, 86 NY2d 814 [1995]). The charge, read as a whole, permitted the jury to convict defendant of criminal possession of a forged instrument based on the types of forged cards he actually possessed.

The court's *Sandoval* ruling balanced the appropriate factors and was a provident exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The court permitted inquiry into a conviction that was highly probative of defendant's credibility, notwithstanding its similarity to the present charge.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Kahn, Kern, JJ.

5427 Damary Guzman, Index 308820/08
Plaintiff-Respondent,

-against-

Promesa Foundation, Inc., et al.,
Defendants-Appellants,

Command Security Corporation,
Defendants, et al.,

_____

Lewis, Brisbois, Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for appellants.

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 11, 2016, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the complaint as against defendant Promesa Residential Health Care Facility, Inc. (Casa Promesa), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants-appellants established prima facie that defendant Casa Promesa did not breach any duty of care to plaintiff by demonstrating that the premises on which plaintiff was attacked were owned by defendant Puerto Rican Organization to Motivate,

Enlighten and Serve Addicts, Inc. (Promesa, Inc.), not by Casa Promesa, and that defendant Promesa Administrative Services Organization, Inc., was responsible for security decisions in all Promesa facilities (*see generally Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 297 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]; *see Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]; *Todorovich v Columbia Univ.*, 245 AD2d 45 [1st Dept 1997], *lv denied* 92 NY2d 805 [1998]).

In opposition, plaintiff failed to raise an issue of fact. Even assuming Casa Promesa owed him a duty, he offered no non-speculative basis for finding a causal connection between any negligence on its part and the attack on him.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5428 In re Jaylanisa M. A.,

Christopher A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, Bronx County (Michael Milsap, J.), entered on or about September 27, 2016, which, after a hearing, granted the maternal cousin/foster mother's petition to be appointed kinship guardian of the subject child, unanimously affirmed, without costs.

The child was placed in the care of the foster mother when she was about two weeks old, and has remained in her care. After the child's removal from the birth mother's custody, a finding of neglect was entered against the birth mother.

The foster mother had standing to seek kinship guardianship without appellant's consent (Family Ct Act § 1055-b). Extraordinary circumstances were established based on the undisputed fact that the birth mother and appellant, who purports

to be the father, were living in a tent under a highway overpass (*Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]). Appellant's prolonged separation from the child and failure to assume a parental role also constituted extraordinary circumstances (*see Matter of Colon v Delgado*, 106 AD3d 414, 414-415 [1st Dept 2013]; *Matter of Dianne M. v Princess R.F.*, 82 AD3d 481 [1st Dept 2011]). The grant of guardianship to the foster mother clearly was in the best interests of the child (*Matter of Louis N. (Dawn O.)*, 98 AD3d 918, 919 [1st Dept 2012]; *Matter of Dianne M. v Princess R.F.*, 82 AD3d at 481; Family Ct Act § 1055-b).

Appellant's argument that his due process rights were violated is waived, since he did not raise it in the Family Court and it does not pose a pure question of law appearing on the face of the record which could not have been avoided (*Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [1st Dept 2006]). Even if we were to consider this argument, it is unavailing. On the present record, appellant has not established by clear and convincing evidence that he has standing to seek visitation or custody. It is undisputed that the birth mother and appellant were never married (*cf. Matter of Maria-Irene D. [Carlos A.-Han Ming T.]*, 153 AD3d 1203, 1205 [1st Dept 2017]), and appellant never filed a paternity petition or acknowledgment

of paternity. Moreover, appellant has not proved by clear and convincing evidence that he and the mother agreed to conceive and raise the child together, or that the mother consented to the post-conception creation of a parent-like relationship between appellant and the child (*see Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 27-28 [2016]; *cf. Frank G. v Renee P.-F*, 142 AD3d 928, 930-931 [2d Dept 2016], *lv dismissed* 28 NY3d 1050 [2016]). If the child ever lived with appellant, and the record does not demonstrate that she did, he certainly has not done so since the child was placed in foster care at the age of two weeks, and he does not assert that he took steps to establish a parental relationship with, or to provide support for her.

The record shows that appellant had meaningful legal representation at the guardianship hearing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5429 Elsa Medina-Ortiz, Index 22159/17E
Plaintiff-Appellant,

-against-

Luis A. Seda,
Defendant-Respondent.

_____

Hausman & Pendzick, Harrison (Alan R. Gray, Jr. of counsel), for appellant.

Russo & Tambasco, Melville (Yamille Al-Sullami of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered July 21, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of her entitlement to summary judgment on the issue of liability through her affidavit averring that her car was stopped when it was hit in the rear by defendant's car (*see e.g. Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]). The burden then shifted to defendant "to come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]).

Defendant met his burden through his affidavit averring that, after he exited onto Bruckner Boulevard, a service road, he saw plaintiff's car stopped in the middle lane, and then suddenly

begin backing up, thereby "causing the accident." Viewing the facts in the light most favorable to defendant, and giving him the benefit of every available inference in his favor as the nonmoving party on this summary judgment motion (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), the record would permit a factfinder to conclude that plaintiff was negligent, and that her negligence was the sole or a proximate cause of the accident. Thus, the court properly concluded that the parties' differing versions of how the accident occurred precluded summary judgment (*see Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]; *DeRosa v Valentino*, 14 AD3d 448 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5430 In re Eileen Dechbery, Index 100216/14
Petitioner-Appellant,

-against-

Salvatore J. Cassano, etc., et al.,
Respondents-Respondents.

_____

Law Offices Robert N. Felix, New York (Robert N. Felix of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered July 8, 2016, insofar as it denied petitioner Eileen Dechbery's request for attorneys' fees in this article 78 proceeding, unanimously affirmed, without costs.

The court properly exercised its discretion in denying petitioner attorneys' fees for this proceeding seeking to vindicate her rights pursuant to Civil Service Law § 71. The general rule is that in Article 78 proceedings, "the prevailing party may not collect [attorneys' fees] from the loser unless an award is authorized by agreement between the parties or by statute or by court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). A petitioner in an Article 78

proceeding may be entitled to attorneys' fees under 42 USC § 1988 where she asserts a substantial federal constitutional claim (*see Matter of Thomasel v Perales*, 78 NY2d 561 [1991]).

Petitioner is not entitled to an award of attorney's fees as she has not successfully asserted a substantial federal constitutional claim in the proceeding. Although she alleges that her due process rights were violated, the mere fact that respondents mailed her notice of termination letter to her prior address does not constitute a violation of her due process rights as she was provided with post-termination due process (*see Santiago v Newburgh Enlarged City Sch. Dist.*, 434 F Supp 2d 193, 198 [SD NY 2006]).

Additionally, petitioner has failed to establish her entitlement to an award of attorneys' fees under the New York State Equal Access to Justice Act (CPLR Article 86) (*see Matter of Cintron v Calogero*, 99 AD3d 456, 457 [1st Dept 2012], *lv denied* 22 NY3d 855 [2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5431 The People of the State of New York, Ind. 4731/14
Respondent,

-against-

Ricky Beck,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered October 15, 2015,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 11, 2018

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5432 Highland Capital Management, L.P., Index 160524/16
Plaintiff-Appellant-Respondent,

-against-

Geoffrey Stern, et al.,
Defendants-Respondents-Appellants.

_____

Boies Schiller Flexner LLP, Washington, DC (Scott E. Gant of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant-respondent.

Kasowitz Benson Torres LLP, New York (David S. Rosner of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered May 4, 2017, which granted defendants' motion to dismiss, and denied their motion for sanctions, unanimously affirmed, with costs.

Defendant Stern's statement to the Wall Street Journal, that plaintiff investment advisor "just took our money," fell within the statutory privilege against libel claims for the publication of a fair and true report of a judicial proceeding (Civil Rights Law § 74; *see Alf v Buffalo News, Inc.*, 21 NY3d 988, 989 [2013]; *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]). The statement, in the context of the article, which was about lawsuits filed against plaintiff, would be understood by an ordinary reader to refer to

defendant Muirfield Capital Management LLC's claim that plaintiff improperly withdrew money from an investment fund plaintiff managed, in which Muirfield invested (*see Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; *Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013]).

Although the action lacks merit, it cannot be said that it reaches to a level of frivolousness or harassment so as to warrant sanctions (*see* 22 NYCRR 130-1.1[a]; *see generally Nyitray v New York Athletic Club in City of N.Y.*, 274 AD2d 326, 327 [1st Dept 2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5433 In re Gennadiy Dikovskiy, Index 652135/15
Petitioner-Respondent,

-against-

New York City Board of Education
doing business as New York City Department of
Education), et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for appellants.

Steven S. Landis, P.C., New York (Steven S. Landis of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered August 29, 2016, denying respondents' cross motion to dismiss the petition, brought pursuant to CPLR article 75, granting the petition, and vacating the penalty in its entirety, unanimously affirmed, without costs.

Where, as here, the parties have submitted to compulsory arbitration, the hearing officer's determination must be in accord with due process, supported by adequate evidence, and rational, and must not be arbitrary and capricious (*see Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-419 [1st Dept 2013]).

The motion court properly concluded that the hearing officer's determination was arbitrary and capricious, and not

supported by the record. There was no evidence that petitioner teacher's conduct toward a student violated any rule or regulation or was otherwise inappropriate. Moreover, respondents' various training materials encouraged teachers to interact with students outside the classroom to foster student development, and the alleged "inappropriate" conduct was not sufficiently defined so as to put petitioner on notice as to what constituted misconduct. Furthermore, based on our review of the video, we do not find that the teacher engaged in any inappropriate behavior with a student.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5434 Anthony Boneventura, Index 112378/11
Plaintiff-Respondent,

-against-

60 West 57 Realty LLC, et al.,
Defendants-Respondents,

New York Parking 56th Street Corp.,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for Anthony Boneventura, respondent.

Ropers Majeski Kohn & Bentley, P.C., New York (Lisa M. Fitzgerald of counsel), for 60 West 57 Realty LLC and 5657 Realty Corp., Inc., respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered April 18, 2017, which denied the motion of defendant New York Parking 56th Street Corp. (New York Parking) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when he tripped and fell on the part of the sidewalk that New York Parking used as a driveway for its parking garage that it leased from defendant 60 West 57 Realty LLC. The record presents triable issues of fact as to whether New York

Parking's use of the sidewalk was a special use, and whether that special use caused the defect in the sidewalk that caused plaintiff to fall (*see Mincey v Mensch*, 253 AD2d 656 [1st Dept 1998]; *Adorno v Carty*, 23 AD3d 590 [2d Dept 2005]; *see also Infante v City of New York*, 258 AD2d 333 [1s Dept 1999]). The duty to maintain the area of special use runs with the land and is not dependent upon a finding that New York Parking actually inspected the sidewalk or repaired it (*see Karr v City of New York*, 161 AD2d 449 [1st Dept 1990]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5435 The People of the State of New York, Respondent, Ind. 2432/14

-against-

Frederick Rodriguez, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Oliver McDonald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at hearing; Ronald A. Zweibel, J. at plea and sentencing), rendered April 30, 2015, convicting defendant of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

After a sufficient inquiry, the suppression court providently exercised its discretion in denying defendant's request for new counsel, made as the hearing was about to begin. Contrary to defendant's assertion, the court did not merely conduct a perfunctory inquiry, but instead allowed defendant to voice his concerns about counsel. Furthermore, while the court advised defendant that he had not made any specific allegations, defendant still provided nothing but vague and generic claims not

constituting good cause for substitution of counsel (*see People v Linares*, 2 NY3d 507, 511 [2004]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5436 In re Kathy C.,
Petitioner-Respondent,

-against-

Alonzo E.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Larry S. Bachner, New York, for respondent.

Karen Freedman, Lawyers for Children Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about December 19, 2016, which denied respondent father's motion to vacate his default in a proceeding which, after a hearing, granted petitioner maternal grandmother's application for modification of a prior custody and visitation order, granted her sole legal and physical custody of the subject child, and permitted her to relocate to South Carolina with the child, unanimously affirmed, without costs.

The determination that the father failed to substantiate his claims of a reasonable excuse and a meritorious defense are supported by the record. The father's incarceration did not constitute excusable default (*see Matter of Commissioner of Social Servs. v Kastriot D.*, 101 AD3d 574 [1st Dept 2012], *lv*

denied 21 NY3d 853 [2013]). Further, he failed to seek vacatur until approximately six months after his release from incarceration (*see Matter of Christopher James A. [Anne Elizabeth Pierre L.]*, 90 AD3d 515 [1st Dept 2011], *lv denied* 18 NY3d 918 [2012]).

The father also failed to present evidence of a meritorious defense to the petition, and the maternal grandmother demonstrated a change in circumstances since the prior custody order was entered and that her proposed modification would be in the child's best interest (*see Matter of Johnny Eugene P. v Michelle K.P.*, 140 AD3d 624 [1st Dept 2016]; *Matter of Manuel John M. v Lisa Rossi M.*, 125 AD3d 407, 408 [1st Dept 2015], *lv denied* 25 NY3d 904 [2015]).

Contrary to the father's argument, even assuming at a rehearing he would proffer evidence regarding a strong bond between him and the child, the fact that he had relinquished parenting responsibilities for the entirety of the child's life, coupled with his history of significant domestic violence, would nonetheless have merited a finding of extraordinary circumstances (*see Matter of Sharon B. v Tiffany P.*, 143 AD3d 573 [1st Dept 2016]). Following the finding of extraordinary circumstances, the court properly found that it was in the child's best interest

to award sole custody to the maternal grandmother and grant her permission to relocate with the child to South Carolina (*see Matter of Christopher E.C. v Ivana K.S.*, 143 AD3d 420 [1st Dept 2016]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5437 The People of the State of New York, Respondent, Ind. 5584/13

-against-

William Edwards, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 3, 2014, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve communications between defendant and counsel that are not reflected in the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and

federal standards in connection with his plea (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's challenges to the validity of his plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made. Defendant's challenges to the form, sequence and content of the plea colloquy are without merit (*see e.g. People v Rivera*, 118 AD3d 626 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]).

Defendant's argument concerning his adjudication as a second violent felony offender is likewise unpreserved, and we decline to review it in the interest of justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5438 The People of the State of New York, Respondent, Ind. 2225/12

-against-

Anton Hill, Defendant-Appellant.

_____

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered August 15, 2014, convicting defendant, after a jury trial, of kidnapping in the second degree, and sentencing him, as a second violent offender, to a term of 15 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence overwhelmingly established that defendant restrained the victim under the threat of deadly physical force (*see* Penal Law §§ 135.00, 135.20; *People v Dodt*, 61 NY2d 408, 411 [1984]). Defendant wielded a pistol and repeatedly punched the victim until he broke his jaw, while preventing him from leaving his

place of business as defendant demanded repayment of a debt.

The court providently exercised its discretion in admitting an audio recording of the incident made by the victim on his phone. The victim testified that it was a true and accurate representation of the incident, and that he did not tamper with or alter the recording before giving it to the People. This was all the authentication testimony required by law (*see People v Ely*, 68 NY2d 520, 527–28 [1986]). Moreover, two other witnesses, including a defense witness, confirmed the recording's accuracy. The recording was not rendered inadmissible by the fact that it did not capture the entire incident, because the witnesses testified that it did so for the time that it was recording, and the jury was aware that it omitted the beginning and end of the incident (*see People v Devers*, 82 AD3d 1261, 1262 [2d Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see also People v Cabrera*, 137 AD3d 707 [1st Dept 2016], *lv denied* 27 NY3d 1129 [2016]).

In a trial marked by lengthy and contentious cross-examinations of the People's witnesses, the court providently exercised its discretion when it requested, at one point, that defense counsel disclose what other areas he wanted to explore during the remaining cross-examination of the victim. This did not amount to an improper curtailment of cross-examination in these circumstances. In any event, the court permitted inquiry

into the areas defense counsel sought to explore.

The court also providently exercised its discretion in giving the jury an instruction that a claim of right was not a defense to the submitted count of assault in the first degree. Although no such defense was raised and no such charge was requested, the evidence suggested that defendant beat and threatened the victim in an effort to collect a legitimate debt. Accordingly, this anticipatory instruction was appropriate for the purpose of avoiding speculation by the jury (*see People v Pagan*, 81 AD3d 86, 92 [1st Dept 2010], *affd* 19 NY3d 91 [2012]; *People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]).

The portion of the prosecutor's summation suggesting that the defense witness had a "motive to fabricate" was a fair comment on the evidence that was responsive to the defense summation (*see People v Overlee*, 236 AD2d 133, 136 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]).

Defendant's remaining contentions concerning the prosecutor's summation and the court's conduct of the trial are

unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5439 Thomas Megan, et al., Index 159395/13
Plaintiffs-Appellants-Respondents,

-against-

New York Stock Exchange Inc.,
Defendant,

Schindler Elevator Corporation,
Defendant-Respondent-Appellant.

_____

Ronemus & Vilensky, New York (Michael B. Ronemus of counsel), for appellants-respondents.

Sonageri & Fallon, LLC, Garden City (James L. Sonageri of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered January 30, 2017, which denied plaintiffs' motion for partial summary judgment on the issue of liability as against defendant Schindler Elevator Corporation (Schindler), and denied Schindler's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Thomas Megan was injured when he suffered an electrical shock as he attempted to lock an ash lift's control box. He established his prima facie entitlement to partial summary judgment on the issue of liability in this action by submitting evidence that defendant Schindler's elevator technician had replaced the twist lock receptacle in the control

box just prior to the accident and had failed to properly ground the control box when he made the repair(*see e.g. Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]).

In opposition, Schindler raised a triable issue of fact based on the deposition testimony of the elevator technician that he never performed any work on the control box at any time (*see Josephson v Crane Club*, 264 AD2d 359 [1st Dept 1999]; *see also Butler v Helmsley-Spear, Inc.*, 198 AD2d 131, 132 [1st Dept 1993]) and the opinion offered by Schindler's expert that the cause of the accident was attributable to a third party's original configuration of the control box.

In view of the foregoing triable issues, Schindler's cross motion for summary judgment dismissing the complaint was also properly denied.

We have considered the parties' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5440 CitiMortgage Inc., Index 106760/08
Plaintiff-Respondent,

-against-

Nkenge Scott,
Defendant-Appellant,

John Does No. 1 through 10, etc.,
et al.,
Defendants.

_____

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Eric P. Blaha of counsel), for appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 15, 2016, which, following a traverse hearing, denied defendant Nkenge Scott's motion to, among other things, vacate the default judgment entered against her, unanimously affirmed, without costs.

There exists no basis to disturb the hearing court's determination, which turned largely on the credibility of the witnesses and was substantiated by the record, including affidavits of service (*see Arrufat v Bhikhi*, 101 AD3d 441, 442 [1st Dept 2012]). Plaintiff satisfied its burden of establishing, by a preponderance of the evidence, that service of process was effectuated on defendant and personal jurisdiction

was thereby obtained (*see* CPLR 308[2]; *Gass v Gass*, 42 AD3d 393, 393 [1st Dept 2007]). While defendant submitted evidence of her residence at another location, she did not conclusively establish that she did not reside at the subject property, which she had identified in the loan application as her primary address (*see Arrufat*, 101 AD3d at 442; *Cadle Co. v Nunez*, 43 AD3d 653, 656 [1st Dept 2007]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5442 The People of the State of New York, Respondent, Ind. 5195/11

-against-

Shanice Warner, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 25, 2012, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5443 Guidance Endodontics, LLC, Index 163139/15
Plaintiff-Appellant,

-against-

Olshan Grundman, Frome Rosensweig and Wolosky, LLP,
Defendant-Respondent.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Stephen Jacobs of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 3, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's claims in this legal malpractice action are barred by the doctrine of collateral estoppel (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; CPLR 3211[a][5]). There is an identity of issues necessarily decided in plaintiff's related malpractice action against defendant's cocounsel in New Mexico and decisive of this action, and plaintiff does not dispute that it vigorously contested cocounsel's successful motions for summary judgment dismissing the New Mexico action.

We note also that the complaint fails to state a cause of action (CPLR 3211[a][7]). The allegations not only are sheer

speculation but also are precluded by plaintiff's settlement of the underlying action for reasons other than defendant's alleged malpractice (*see Rodriguez v Fredericks*, 213 AD2d 176, 178 [1st Dept 1995], *lv denied* 85 NY2d 812 [1995]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5444 The People of the State of New York, Ind. 2418/15
Respondent,

-against-

Edward Corniel,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered February 24, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5445N-
5446 The Carlyle, LLC, Index 652780/13
Plaintiff-Appellant,

-against-

Beekman Garage LLC, et al.,
Defendants,

Quick Park 1633 Garage LLC,
Defenant-Respondent.

- - - - -

Rafael Llopiz, et al.,
Nonparty Respondents.

_____

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for appellant.

DLA Piper LLP (US), New York (John Vukelj of counsel), for Quik Park 1633 Garage LLC, Citizens Icon Holdings, LLC, and Quik Park West 50th Street, LLC, respondents.

Feuerstein Kulick LLP, New York (David T. Feuerstein of counsel), for Rafael Llopiz, respondent.

_____

Order Supreme Court, New York County (Joan M. Kenney, J.), entered January 10, 2017, which denied plaintiff's motion for summary judgment on its cause of action for use and occupancy against defendant Quik Park 1633 Garage LLC (QP 1633), unanimously affirmed, without costs. Order, same court and Justice, entered March 6, 2017, which denied plaintiff's motion to compel QP 1633 and nonparties Rafael Llopiz, Citizens Icon Holdings, LLC, and Quik Park West 50th Street, LLC, to comply with postjudgment subpoenas, and granted Llopiz and defendants'

cross motion for a protective order, unanimously affirmed, without costs.

Summary judgment on the cause of action for use and occupancy is precluded by issues of fact as to the nature of the use and occupancy, assuming that QP 1633 occupied the parking garage premises at issue, and whether the repairs undertaken by plaintiff constituted a partial actual eviction of QP 1633 from the premises (*see 81 Franklin Co. v Ginaccini*, 160 AD2d 558, 559 [1st Dept 1990]; *Union City Union Suit Co. v Miller*, 162 AD2d 101, 105 [1st Dept 1990], *lv denied* 77 NY2d 804 [1991]). Moreover, in the event it is determined that there was no partial actual eviction, it will be necessary to determine the value of the use and occupancy, which was not included in the assessment of damages for unpaid rent.

Plaintiff's postjudgment disclosure demands were overly broad (*see Stern v Carlin Communications*, 210 AD2d 110 [1st Dept

1994]; CPLR 5223; 5224). In addition to information related to the judgment debtors' assets, plaintiff improperly sought information related to the assets and operations of the non-judgment-debtors it subpoenaed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kahn, Kern, JJ.

5447 In re John Walden, Ind. 3190/15
[M-5767] Petitioner,

-against-

Hon. Arlene Goldberg, etc.,
Respondent.

- - - - -

Cyrus R. Vance, Jr., etc.,
Nonparty Respondent.

_____

John Walden, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Arlene Goldberg, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress of counsel), for Cyrus R. Vance, Jr., District Attorney, respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the

same hereby is denied and the petition dismissed, without costs or disbursements.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 11, 2018

CLERK